

Before the
Federal Communications Commission
Washington, D.C. 20554

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| In the Matter of |) | |
| |) | |
| Rules and Regulations Implementing the |) | CG Docket No. 02-278 |
| Telephone Consumer Protection Act of 1991 |) | |
| |) | |
| Communication Innovators Petition for |) | |
| Declaratory Ruling |) | |

**REPLY COMMENTS OF AMERICAN BANKERS ASSOCIATION
AND CONSUMER BANKERS ASSOCIATION**

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EXECUTIVE SUMMARY

The American Bankers Association and the Consumer Bankers Association urge the Commission to address the ongoing legal uncertainty concerning the use of mobile services for a wide range of non-telemarketing communications. A declaration that technologies used to communicate with mobile devices, where those technologies lack the capacity to generate numbers randomly or in sequence, may be used for non-telemarketing purposes would serve the public interest and advance Congress's intent in passing the Telephone Consumer Protection Act.

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American Bankers Association (ABA)¹ and Consumer Bankers Association² (CBA) respectfully file these reply comments in support of the Communication Innovator's Petition for Declaratory Ruling (CI Petition).³ We urge the Commission to clarify that dialing technologies that are not used for telemarketing purposes and do not have the current ability to generate and dial random and sequential numbers are not "automatic telephone dialing systems" (ATDS) as defined by the Telephone Consumer Protection Act (TCPA)⁴ and the Commission's interpretive TCPA rules.⁵

¹ American Bankers Association represents banks of all sizes and charters and is the voice for the nation's \$14 trillion banking industry and its two million employees. The majority of ABA's members are banks with less than \$165 million in assets.

² Consumer Bankers Association is the only national financial trade group focused exclusively on retail banking and personal financial services. CBA provides leadership, education, research and federal representation on retail banking issues. CBA members include most of the nation's largest bank holding companies, as well as regional and super-community banks that collectively hold two-thirds of the industry's total assets.

³ Communication Innovators, Petition for Declaratory Ruling in GC Docket No. 02-278 (filed June 7, 2012).

⁴ See 47 U.S.C. §227.

⁵ See 47 C.F.R. §64.1200.

I. The Commission should resolve without delay the uncertain status of various dialing technologies under the ATDS definition.

Beginning as early as 2002, various parties have asked the Commission to resolve the uncertain status of various dialing technologies under the ATDS definition, which states that an ATDS is “equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator, . . . and to dial such numbers.”⁶ As the record in this docket amply demonstrates, recent calls for modernization of an outdated and overly broad definition have intensified. Skyrocketing TCPA class litigation is hindering innovation, diverting time and resources away from serving customers, and threatening to curtail valued and sometimes critical account communications.

On three occasions since 2010, ABA and CBA have urged the Commission to clarify and modernize the ATDS definition. As explained at greater length in our previous filings, we believe that the Commission can advance the intent of the TCPA by confirming what the statute says: i.e., that automatic telephone dialing systems are equipment with the capacity to use a random or sequential number generator to store or produce, and to dial, numbers to be called. The Commission then should adopt a common-sense reading of the “capacity” requirement. Specifically, the Commission should find that dialing systems lack the required capacity unless the equipment can be used, without modification of the hardware, reprogramming of the software, or enabling of features that the device could support but that are not available as the device is currently operated or configured, to generate numbers randomly or in sequence.⁷

⁶ 47 U.S.C. § 227(a)(1).

⁷ See Comments of ABA and CBA to SoundBite Communication, Inc. Petition for Expedited Declaratory Ruling, GC Docket No. 02-278 (filed February 16, 2012); Comments of ABA and CBA to GroupMe, Inc. Petition for Expedited Declaratory Ruling, GC Docket No. 02-278 (filed March 1, 2012); Comments of ABA, CBA and FSR to *Rules and*

II. The Commission should distinguish between informational and telemarketing calls.

Those who oppose the CI Petition assert that the TCPA does not support a distinction between informational and telemarketing calls;⁸ however, the Commission recently recognized that informational calls are “highly desirable” and elected not to impose new restrictions on autodialed and prerecorded non-telemarketing calls to wireless telephone numbers. As stated by the Commission, “While we observe the increasing pervasiveness of telemarketing, we also acknowledge that wireless services offer access to information that consumers find highly desirable and thus do not want to discourage purely informational messages.”⁹ Thus, the Commission concluded that written consent was necessary for telemarketing calls, but oral consent was sufficient for non-telemarketing calls. We support that distinction. Consistent with the Commission’s desire not to discourage informational messages, the Commission should adopt a similar approach here: interpreting “capacity” to mean *present capacity* when an ATDS is used to place a non-telemarketing call or text.

ABA and CBA believe that such an interpretation is consistent with the Commission’s prior practice, and it is essential to ensuring that banks and other businesses can continue to provide important and valued informational calls to customers about existing products and services. Moreover, such an interpretation will enable banks and other service providers to develop and implement new and innovative ways to serve and communicate appropriately with their customers through their mobile devices without seeking piecemeal rulings from the

Regulations Implementing the Telephone Consumer Protection Act of 1991, Notice of Proposed Rulemaking, 25 FCC Rcd. 1501 (Jan. 22, 2010).

⁸ See Comments of the National Association of Consumer Advocates; Gerald Roylance; Joe Shields; and Robert Biggerstaff, CG Docket No. 02-278.

⁹ Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991, CG Docket No. 02-278 (Feb. 15, 2012) (2012 TCPA Order).

Commission as to their legality and without wasting time and resources on the defense of needless and protracted litigation. At the same time, consumers will continue to enjoy the full range of protection from abusive telemarketing practices afforded by the TCPA and the Commission's regulations.

III. TCPA class action litigation threatens to deter informational communication between a bank and its customers to the detriment of consumer welfare.

Automatic telephone dialing systems enable financial institutions to provide important communications to large numbers of consumers quickly, efficiently, and economically. As described in the CI Petition and the comments of the U.S. Chamber of Commerce, however, skyrocketing TCPA class action litigation – litigation driven primarily by opportunistic plaintiff's attorneys rather than aggrieved consumers – threatens to deter banks' efforts to communicate with customers, to the detriment of consumer welfare.

Autodialers and prerecorded messages permit banks to contact quickly large numbers of customers to alert them to threatened security breaches and out of pattern activity, enabling customers to monitor their accounts and take appropriate defensive action quickly. Prompt action by both the customer and the institution following these incidents is crucial to limit losses. Not surprisingly, customers value banks' efforts to contact them immediately, but these timely communications are being threatened by the specter of TCPA class action liability.

Similarly, financial institutions use autodialed telephone communications to protect customers' credit and help them avoid fees. Customers may be alerted by voice or text about low account balances, overdrafts, over-limit transactions or past due accounts in time for those customers to take action and avoid associated fees. These reminder calls and texts also help consumers avoid late payments, accrual of additional interest, and negative reports to credit

bureaus. Indeed, the Consumer Financial Protection Bureau has expressed an interest in promoting the use of low-balance text alerts as a means of helping consumers take timely corrective action and avoid overdraft fees.¹⁰ However, bank ability to provide alerts is being undermined by the threat of class action liability.

Finally, as discussed in our comments to the GroupMe petition, consumers increasingly demand that payments and other bank services be implemented through their mobile devices, but unnecessary restrictions on non-telemarketing mobile communications and the threat of class action liability will impede the development of new technologies and services that the Commission has declared its intention to promote and which customers are seeking.¹¹

IV. The assertion that consumers overwhelmingly oppose clarification of the ATDS definition is unfounded.

The National Association of Consumer Advocates (NACA) assertion that the withdrawal of H.R. 3035, a bill introduced in September 2011 that sought to modernize the ATDS definition, evidenced an overwhelming consumer opposition to the Commission's clarification of the ATDS' application to evolving communications is unfounded for several reasons.

First it is a non-sequitur to rely on the graveyard of unpassed bills to infer any policy intent of the general public, particularly one that would be used to interfere with development of the Commission's own path to responsibly fulfill its mission of applying a 21-year old law in a rapidly evolving field.

Second the opposition to H.R. 3035 was mobilized around the specter of a "flood of

¹⁰ See CFPB Notice and Request for Information on the Impact of Overdrafts on Consumers, 77 Fed. Reg. 12031 (February 28, 2012) available at <http://www.gpo.gov/fdsys/pkg/FR-2012-02-28/pdf/2012-4576.pdf>.

¹¹ See Federal Communications Commission, "Connecting America: The National Broadband Plan" at 9 (In which the Commission identified mobile broadband services as one of the most important engines of U.S. economic development and competitiveness.)

solicitation, marketing and debt collection and other unwanted calls and texts to cell phones”¹²—none of which are presented by the relief requested by the CI Petition.

The requested clarification of the ATDS definition will not open the door to telemarketing calls. As explained above, we believe that the Commission’s interpretation of the ATDS definition should distinguish between telemarketing and non-telemarketing calls, leaving in place the ample TCPA protections against unwanted telemarketing texts. Neither will the clarification open the door to a flood of unwanted informational calls and texts to cell phones. Senders of such messages have no incentive to place anything other than those required to communicate important account information. In addition, as we have discussed in other comments filed in this docket, debt collection practices are to be regulated under the Fair Debt Collection Practices Act (FDCPA), which confers authority to control all harassing calls, not just calls to mobile devices under the TCPA. Moreover, for the first time in the 35-year history of the FDCPA, Congress granted an agency, the CFPB, rule-writing authority under the FDCPA. Accordingly, concerns about abusive debt collection calls should be directed to the CFPB, not the Commission.

Finally, ABA and CBA urge the Commission to communicate directly with consumers, as opposed to self-declared consumer advocacy groups, about autodialed informational calls and texts. We believe that a strong and objective consumer survey, for example, would demonstrate that consumers value being connected to their banks for many purposes, including prevention of fraud and identity theft, notice of security breaches, and notice of

¹² NACA Comment, *supra* at Exhibit 1. See also Exhibit 2 (“**The real purpose of H.R. 3035 is to open up *everyone’s* cell phones, land lines, and business phone numbers, without their consent, to a flood of commercial, marketing, and debt collection calls (to not only the debtor but everyone else).**”)(emphasis in original).

missed payments, and that consumers would support clarification of the ATDS to enable financial institutions to provide these important communications to large numbers of consumers quickly, efficiently, and economically and without fear of liability.

V. Conclusion

The CI Petition and other pending requests for relief offer the Commission an opportunity to resolve an issue that is having a significant deterrent effect on banks' ability to provide important and valued informational communications to their customers and is impeding the development of new technologies and services. We urge the Commission to grant the requested relief promptly.

Respectfully submitted,

A handwritten signature in black ink that reads "Virginia O'Neill". The signature is written in a cursive, flowing style.

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